United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1118

To be argued by
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and MICHAEL N. KLAR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1118

UNITED STATES OF AMERICA,
Appellee,

—v.—

FRANK COTRONI and FRANK DASTI,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

POINT I

The government virtually concedes that Title III requires the exclusion of the wiretap evidence herein.

In three rather succinct but revealing references, the government has virtually conceded the validity of appellants' contention that the electronic surveillance herein was violative of Title III, and, as such, should have been excluded from evidence below:

> "* * * it is true (assuming appellants are correct in their arguments regarding the application of Title III) that evidence obtained in violation of Title III was admitted into evidence * * *" (Gov. Br., p. 37).
>
> * * * * *
>
> "* * * we believe that this is one of those cases in which the literal language of (Title III) should not be applied and that, instead, this Court should look

beyond the words to the purpose of the act and the expressed intent of Congress" (Gov. Br., p. 37).

* * * * *

"We recognize that if the Canadian law enforcement officials violated Section 2511 in seizing the conversations here at issue, then a literal application of subdivision (a) would require exclusion of this evidence at the behest of an "aggrieved person" (Gov. Br., p. 34).

In reality, not only the literal language of Title III, but also the "purpose", and the "expressed intent" of Congress as to Title III completely destroy the government's attempt to justify the admission of the wiretaps in the instant case.

A. Any and all persons—including private citizens and foreign officials—are prohibited by Title III from intercepting calls over the United States telecommunications network.

The government has the temerity to characterize as preposterous appellants' argument that the wiretapping herein was tainted. Thereafter, without citation of authority whatever, the government argues that the proscriptions of Title III "apply solely to communications 'unlawfully intercepted' by state and federal law enforcement officials" (Gov. Br., pp. 34, 35) and do not apply to evidence obtained "by private individuals or foreign law enforcement officials * * *" (op. cit., p. 37).

The literal language of Title III, however, as well as the "purpose", and the "expressed intent of Congress" show that such argument is clearly incorrect.

Section 2511, which outlines the prohibitions of interception and disclosure of wire and oral communications, specifically indicates, *inter alia*:

"(1) Except as otherwise specifically provided in this chapter *any person* who—

(a) wilfully intercepts, endeavors to intercept or procures any other persons to intercept or endeavor to intercept, any wire or oral communication; * * *

"shall be fined not more than ten thousand dollars or imprisoned no more than five years, or both. * * *"

Section 2510, of the statute defines a "person" as follows:

"(6) 'person' means any employee, or agent of the United States or any state or political subdivision thereof, and *any individual*, partnership, association, joint stock company, trust, or corporation; * * *" [Emphasis added].

Indeed, the very next definition, § 2510(7), distinguishes the concept of "person" from that of investigative or law enforcement officer.

Thus, when § 2511 proscribes "*any person*" from wilfully intercepting oral or wire communications, not only law enforcement officials but all persons are included in such prohibition. Indeed, it explicitly extends to industrial piracy.

Section 801 of the Public Law 90-35, the preamble to Title III states, *inter alia*:

"On the basis of its own investigations and of published studies, the Congress makes the following findings:

"(a) * * * there has been extensive wiretapping carried on without legal actions and without the consent of any of the parties of the conversations. * * * The contents of these

communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings *and by persons whose activities affect interstate commerce.* * * *"

"(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, *and to prevent the obstruction of interstate commerce*, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized * * *." [Emphasis added].

B. Both the interception and disclosure prohibitions of Title III are enforceable against illegal interceptions, even if the interceptors are personally beyond the reach of our legal process.

Section 2515 of the statute provides that no wire or oral communications may be used in evidence before any court "if the disclosure of that information would be in violation of this chapter."

In short, the clear provisions of the statute utterly refute the government's contention that the seizure of communications by persons other than American law enforcement officers are not manditorily excludible from evidence.

As a further strut on its broken bow, the government contends that Title III and other exclusionary rules are inapplicable "to the conduct of non-citizens in foreign countries" because of the unenforcibility of personal penal and civil sanctions (Gov. Br., pp. 32—fn. 18, 33). The issue is not whether Canadian authorities can, as

a practical matter, be prosecuted. The essence of Title III is the integrity of communications and of the Federal Judicial Process. Since the very revelation in the courtroom constitutes a violation of the privacy value—the primary objective of the statute—sought to be protected by former § 605 of the Federal Communications Act and by the present Title III, the remedy mandated by Congress is the exclusion of evidence so obtained. The integrity of the judicial process requires no less, *Lee* v. *Florida*, 319 U.S. 378 (1967).

C. Title III proscribes the interception of all communications over the United States telecommunications network—including calls initiated from or directed to a foreign jurisdiction.

The government's next contention is that Title III is not applicable to telephone communications between the United States and foreign countries when those conversations are intercepted in the other countries (Gov. Br., p. 28-29).

Illogically, the government acknowledges that the Senate Judiciary Committee Report with respect to Title III states that Title III is intended to apply to communications carried in whole or part "through our Nation's communications network" (Gov. Br., p. 30).

As we noted in our main brief, the statute itself clearly provides for its applicability to both interstate and foreign communications which use the United States telecommunications network, whether in whole or in part, and whether received or originated in the United States (18 U.S.C. § 2510(1)). Indeed, the predecessor statute, 26 U.S.C. § 605 of the Federal Communications Act contained a similar provision. *See*: *Weiss* v. *United States*, 308 U.S. 321 (1939).

We find it incredible that the government should argue to this Court that, although the literal language of Title III makes it applicable to the facts of this case, such clear, literal language should be disregarded. (Gov. Br., pp. 37-8). Wherever one looks beyond the statute, one must reach precisely the same conclusion that is explicitly stated in the statute itself.

D. The government disregarded its obligation to comply with Title III and tacitly encouraged and participated in the illegal interceptions.

The government argues that it had no connection to or involvement in the tainted interceptions herein. As noted *supra*, pp. 2-4, it is clear that government participation in the illegal interceptions is not a requirement for the operation of the exclusionary rule. We respectfully submit, however, that the record supports our contention that the government encouraged and participated in the program of electronic surveillance in this case.

At the outset, it is difficult to resist noting that if basic rules applicable to conspiracy prosecutions were applied to the government's relationship to the illegal wiretapping herein, there would be little doubt that a finding would be more than justified that the government participated in the wiretapping scheme. As this Court has so frequently held, once the existence of a conspiracy is established, "only evidence which, viewed alone, is of relatively slight import, is needed to connect each conspirator with it." *United States* v. *Pardo-Bolland*, 348 F.2d 316 (2d Cir., 1965), *United States* v. *Marchisio*, 344 F.2d 653 (2d Cir., 1965). We respectfully urge that an evenhanded administration of justice requires the application of that very same rule to the government, particularly where, as here, the evidence of

the government's participation is hardly of "slight import".

Agents of the Federal Drug Enforcement Administration played an active and continuous role in the investigation, tape monitoring, visual surveillance in Canada and in the United States, information retrieval, etc., *in and out of Canada*, throughout and prior to the investigatory stage of the facts of this particular case. As they heard the tapes and read the transcripts they forwarded the information to the United States. These agents were hardly casual bystanders. In short, the government clearly comes to this Court with unclean hands, or, more accurately, with unclean ears.

The government not only actively participated in the electronic surveillance process, but also, by the very nature of the extent and eagerness of its participation, encouraged the continuation of that surveillance. They could easily have applied to a Federal District Court for an electronic surveillance order to monitor the telephones in the United States or to authorize them to participate in the monitoring of those conversations in Canada. They did not do so, and, thus, clearly violated the requirements of Title III.

E. Both of the appellants are aggrieved persons within the meaning of 18 U.S.C. § 2510 (11).

The government argues that each of the defendants has standing only to contest the admissibility of his own intercepted conversations. It does so as the first peg of its argument that, as to Cotroni, the admission of the wiretapped conversations was harmless error (Gov. Br., 48-52).* We respectfully submit that both defendants

* The government concedes that the admission of Dasti's conversations were not harmless as to Dasti and, thus, the standing issue is only academic as to him.

are "aggrieved" persons within the meaning of 18 U.S.C. § 2510 (11). That subsection provides:

> " 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

The government overlooks the second phrase of the statute. Both of the appellants were clearly persons "against whom the interception was directed". As this Court held in *United States* v. *Bynum*, 475 F.2d 832 (2d Cir., 1973), at p. 835:

> "* * * The government further urges that neither Bynum nor Cordovano has standing to raise the minimization question. Since the phone was in Garnett's home and listed in the name of one Fred Garnett, we have no doubt that she has properly raised the issue. Moreover, Bynum was clearly an 'aggrieved person' as defined in 18 U.S.C. § 2510 (11) and therefore is given leave to raise the question of the legitimacy of the surveillance under 18 U.S.C. § 2518 (10). Since Bynum was the central figure in the conspiracy, a reversal as to him might well render the convictions of the lesser figures in the scheme vulnerable and entitle them all to new trials. *See*: *United States* v. *Weiss*, 103 F.2d 348, 352 (2d Cir.), *rev'd on other grounds*, 308 U.S. 321 (1939)."

The government's contention is manifestly frivolous.

F. The introduction of the tainted tapes was clearly not harmless error with respect to the defendant Cotroni.*

The government urges that the independent evidence against the defendant Cotroni was so overwhelming that the inclusion of the tainted tapes was harmless error (Gov. Br., pp. 48-52). As noted in the government's brief, its argument in this regard is predicated upon the contention that Cotroni has no standing to contest the legality of the many tapes used in evidence which recorded conversations to which he was not a party. We have disposed of that contention *supra*, at pp. 7, 8. Assuming, *arguendo*, that the government's standing argument is correct as to the defendant Cotroni, we nevertheless submit that the interception of conversations to which he was a party was clearly *not* harmless error.

The government concedes that corroboration of its chief witness Guiseppe Catania, was indispensible in this case in view of his "background and his admitted motivation to avoid a heavy prison sentence" (Gov. Br., p. 49). Indeed, the government concedes that "It was important to *substantially* corroborate Catania's testimony in order to convince the jury to credit it" [Emphasis added] (Gov. Br., p. 49).

In an effort to avoid an admission that the telephone conversations of Cotroni were necessary to accomplish

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*The government concedes that the introduction of the tapes was not harmless as to the defendant Dasti (Gov. Br., p. 49, fn. 31).

such "substantial corroboration" as against him, the government claims that the other intercepted telephone conversations in the case, the physical surveillance and other evidence accomplished that objective to the extent of making the Cotroni conversations "merely cumulative" thus constituting their admission "harmless error" (Gov. Br., **at p. 49**).

The vast majority of the government's argument in this regard relates to facts tending to show the existence of a conspiracy, but not Cotroni's participation in it. That, after all, is the central issue with regard to any defendant on trial in a conspiracy prosecution. It is of overwhelming significance that, in arguing the allegedly "harmless" nature of the Cotroni conversations, the government does not make the slightest effort to indicate to this Court the allegedly cumulative aspects of those conversations, or even the content of those conversations. In actuality, if the government's interpretations and contentions with regard to those conversations were believed by the jury, they form the strongest evidence in the case in terms of corroborating Catania's inculpation of the defendant. In fact, the government concedes: "[W]e recognize that the conversations overheard on those calls were highly incriminating * * *" (Gov. Br., p. 52). The best evidence of that fact is that the Statement of Facts in the government's brief depends for its coherency upon a statement of the contents of each of those conversations:

Conversation 10—Gov. Br., pp. 17-18
Conversation 12—Gov. Br., p. 20
Conversation 16—Gov. Br., p. 22
Conversation 17—Gov. Br., p. 23
Conversations 27, 29, and 31
—Gov. Br., p. 24

We respectfully submit that the government has not sustained its contention, raised for the first time on this

appeal, that the use in evidence of the Cotroni conversations was harmless error.*

POINT II

The wiretapping herein violated Canadian law.

Initially, the government suggests that it is immaterial what the old or new Canadian law might be as to the instant tapes, for, as in the "Silver Platter" cases, Federal law, not Canadian law, is controlling (Gov. Br., pp. 38-9).

If, despite our argument concerning Title III, *supra*, this Court finds it necessary to reach the issue presented by the Canadian law, then it is our contention that Canadian law would have condemned the interceptions and revelations herein as illegal and inadmissible at the time of trial.

§ 25 of the Bell Telephone Act specifically classifies as a misdemeanor the acts which were undertaken by the Canadian police. The government attempts to minimize the molestation and destruction of the telephone lines by quoting testimony of the telephone engineer to the effect that the "subscriber would never know it", i.e., the subscriber would never *realize* that his line had been *tapped*. In fact, the engineer testified that there was "a measurable interference with the service" (A. 1367).

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* It is particularly significant to note that, prior to trial, government counsel advised the District Court that if the wiretapped conversations in this case were ordered to be excluded from evidence, the government would take an appeal to this Court prior to trial for the purpose of contesting that ruling.

It is of further significance to note that despite the government's claims that the evidence in this case was overwhelming, one of the jurors, an obviously intelligent and sensible person, wrote to the trial judge describing her mid-deliberation shift from "not guilty" to "guilty" and expressing doubts as to the propriety of that shift (A. 2785).

Moreover, the testimony is clear that, in tapping the telephones, the wiretappers cut through the wire installation. This damage was not repaired and was left as a permanent condition which would cause the copper wire to oxidize so that within five years the wire would be rendered useless to carry messages (A. 694, 712, 1362). The government ignores that indisputable fact, preferring to focus upon the irrelevant question of whether the subscriber would be aware that his telephone was tapped.

An additional method of interference established by the testimony, and not contested by the government (Gov. Br., pp. 43-44), concerned the permanent "opening" of telephone lines across the city of Montreal. The government contends that the opening of telephone lines was merely an adjunct to the wiretapping and, therefore, is irrelevant to the issue of the legality of the wiretapping (id). It is clear that the majority of the wiretapping herein depended upon the use of this open line system. § 25 of the Bell Telephone Act makes it a misdemeanor for "any person" to "wilfully obstruct or interfere with the working of the said telephone lines". Obstruction and interference is distinguished from an effort to "intercept any message". By leaving a number of lines open across the city of Montreal on a twenty-four hour basis, the wiretappers did "wilfully obstruct or interfere with the working of the said telephone lines". The government's claim that the testimony in this regard "was vague and speculative" is contradicted by the record. In fact, the extent of "blockage or degradation" was capable of measurement and calculation (A. 1360-3, 1374-5).

The government faults the defense for not asking the representative of the Bell Telephone Company of Canada, "whether the Company would have consented to permit the tapping of the phones here" (Gov. Br., p. 44, fn. 28). Aside from the fact that the government never chose to

ask that question, we have it from the chief wiretapper himself, Claude Lavallee:

> "Q. Is there any method that is provided for by Bell Telephone in the aid of the police function that they set something up like this for you? A. Not at all.
>
> "Q. Have you ever gone to Bell and asked them to cooperate in the public interest for this? A. Yes.
>
> "Q. And? A. They laughed at me.
>
> "Q. They laughed at you? A. Yes.
>
> "Q. They would not let you use your equipment for that purpose? A. No sir.
>
> "Q. In using a fictitious name to rent a telephone, was that for the purpose of deceiving the telephone company so that they did not know this was happening? A. Yes, sir.
>
> "Q. And in using the phone 1234, and in renting the phone as if you were an ordinary subscriber, that too was for the purpose of deceiving the Telephone Company so they didn't know this was going on? A. Yes, sir" (A. 708-9).

* * * * *

In our main brief at pp. 27-34, we argue that the wiretapping herein violated § 25 of the Bell Telephone Company Act and § 24 of the Quebec Telephone Companies Act (similar to § 112 of the Ontario Telephone Act). In this regard, we stated that no cases had been forthcoming from the prosecution to support the position that the fruits of such violations are admissible in evidence in the Courts of Canada (Appellants' Brief, at p. 34). In view of the very recent authorities set forth in the Government's Appendix (Volume V, pp. A. 2801-2914), we must withdraw that assertion. However, it is to be noted that each of the cited authorities are lower court opinions having little persuasive effect. Moreover,

none of those opinions indicate that the evidence before the Court showed the extent and results of damage to the telephone system that is established by the record in the instant case. Nor do those cases show that there was any evidence before the Court that a fraud was perpetrated upon the Telephone Company or that the Telephone Company had refused to grant police authorities permission to utilize its equipment in the manner demonstrated here.

For the reasons set forth in our main brief, at pp. 27-36, it is respectfully submitted that the wiretaps in this case were in violation of Canadian law and that the imperative of judicial integrity requires that evidence so obtained be excluded in an American Federal Court.

POINT III

The destruction of much of the wiretap product and the refusal of the Canadian government to make available much of the remainder of that product, required the exclusion of all of the wiretap evidence.

The trial court's refusal to review the available materials in Canada and the prosecution's dilatory pretrial tactics deprived the defendants of due process of law.

A. The late production of the available wiretap product.

The government seeks to persuade this Court that the defense was given ample opportunity to review the available wiretap materials. We have reproduced at A. 219-222 the tables of contents of the four batches of discovery material provided to the defense during the period commencing November 1, 1974 and ending in the midst of the wiretap hearing. On November 1, 1974, the government provided a tape recording of the conversations which it intended to introduce into evidence. It did not provide

any information with regard to the fifteen summaries later introduced into evidence, but as to which the recordings had been destroyed. Much of the recorded information was in french, and no transcripts or translations were provided.

On November 8, the government provided the defense with french and english transcripts of five of the conversations which it intended to introduce into evidence (A. 220).

On November 20, 1974 (A. 18), the prosecution made available to the defense seventeen transcripts of recorded conversations which it intended to offer in evidence and edited summaries (*in french*) of the logs of intercepted conversations for five of the taps covering the period December, 1970 and January, 1971.*

On December 9, 1974, the government provided the defense with an edited version of nine logs for the various Vegas taps, covering the period December, 1970 and January, 1971 (A. 24, 222). Those portions of the logs which were deemed not "relevant" were not translated from the french. Additionally, the government stated: "Summaries of certain irrelevant conversations which the Canadian Government does not wish to make public at this time have been omitted from the discovery material and will be provided to the Court for *in camera* inspection" (A. 24). Many of the summaries provided to the defense merely stated, "nothing of importance this day."

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* The government's brief erroneously claims that this material was supplied on November 14, 1974, the day that the wiretap hearing commenced (Gov. Br., p. 53; A. 419). Although the list of discovery materials bears that date (A. 221), the letter of transmittal from the United States Attorney is dated November 20, 1974). This belies the government's claim that the materials "were turned over to the appellants as soon as they were received" (Gov. Br., p. 53, fn. 34).

As can be seen, the bulk of the produced material was made available during the midst of the complicated wiretap hearings. The remainder was never made available. The trial commenced on January 6, 1975.

With respect to the prejudice thereby suffered by the defense by virtue of the late production of this huge amount of material, and the Canadian Government's exercise of control over material that was not produced or destroyed, and the trial judge's refusal to travel to Canada to view available materials, we rely upon the arguments contained in our main brief at pp. 39-40.*

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* The government claims that since the process of editing and destruction was disclosed to the jury, the failure of the Canadian Government to produce some of the wiretap materials and the destruction of other wiretap materials, removed any "legal impediment to the admissibility" of unavailable conversations (Gov. Br., p. 59). That claim is nonsense. The real issue is not whether one of the government witnesses, Couture, had evaluated and destroyed tapes in good faith. The fact is that materials which may have been of value to the defense were placed beyond the reach of the defense. There is no basis for concluding that such materials would not have been of extreme value to the defense.

The government also claims that the defense would only have been entitled to such material, as a matter of due process, if it had been "exculpatory". As this Court noted in *United States* v. *Polisi*, the prosecutor has an obligation to provide the defense with "evidence exculpatory of or *otherwise favorable* to the accused." *United States* v. *Polisi*, 416 F.2d 573, 577 (2d Cir. 1969).

Judge Mishler had his own theory as to why it was not necessary to provide the defense with conversations of the defendants which the government did not intend to introduce into evidence, even if such conversations indicated an absence of guilt. His claim was that an exculpatory statement by a defendant on a wiretapped telephone conversation would not be admissible since it would be "a self-serving declaration" (A. 1044, 1302). While explaining Judge Mishler's lax attitude, this rationale clearly constituted reversible error. Wigmore, *Evidence* (3rd Ed.) § 1732.

POINT IV

The Government's enlargement of the charges of the indictment to include the Bynum narcotic ring and the claim of a future intent to traffic in heroin deprived the defendants of a fair trial.

A. When did the government become aware of the alleged conspiratorial nexus between the "Bynum Organization" and the "Cotroni Organization" involving importation of heroin and cocaine from Mexico and Europe?

In its brief, the government appears to have succumbed to a serious mis-statement. At p. 61, fn. 37, the government represents as follows to this Court:

> "The appellants claim erroneously that 'the government knew long in advance of this trial of the alleged connection between the instant conspiracy and the activity of the Bynum group' (Br. 43). The prosecution did not establish with certainty the connection with the Bynum group, which was testified to by George Stewart, until the third week in November, 1974 (A. 2226). The Bynum link was discovered fortuitously when a law enforcement officer who had participated in the Bynum investigation happened to be present when the Assistant United States Attorney was listening to the Cotroni-Dasti tapes. The remarks made in some of the taped telephone conversations about the damaged cocaine (an aspect of the Bynum case) led the law enforcement officer to suggest that there was a connection between the cocaine purchased by Cotroni and Dasti and the Bynum ring. It was at this point that the prosecution began developing the Bynum aspect of its case against the appellants."

It would appear from the above quoted statement that the Drug Enforcement Administration (formerly the Bureau of Narcotics and Dangerous Drugs) is possessed of a virtual Sherlock Holmes who, by virtue of a passing reference to "damaged cocaine" was able to "suggest" a connection between the two organizations. It was as a result of that "suggestion" that the prosecution "began developing" the Bynum-Cotroni nexus in late November, 1974.

The knowledge of the attorney who prosecuted this case appears to have been completely divorced from that of his brothers, across the river, who prosecuted the Bynum case. More important, the Drug Enforcement Administration appears to have suffered an acute case of amnesia.

As shown by the government's brief, the operative events of the instant case are alleged to have occurred during the period commencing "toward the end of December, 1970" (Gov. Br., at p. 6) and ending on January 22, 1971 (Gov. Br., p. 24). Bynum and his associates were the subjects of wiretap surveillance during the period commencing January 30, 1971 and ending March 3, 1971 (*See*: the Supplemental Brief filed by the government upon that aspect of the Bynum appeal which resulted in this Court's opinion in *United States* v. *Bynum*, 485 F.2d 490 (2d Cir., 1973); [hereinafter "Bynum brief"]). During the course of the Bynum wiretaps, then District Judge Travia was presented with an "Organizational Flow Chart which identified and located many of the members of Bynum's vast narcotics enterprise" (Bynum brief, p. 19). A copy of that chart was marked in evidence during the Bynum minimization hearing which occurred in April and May, 1973 (Bynum brief, pp. 2, 19). A copy of that chart was attached to the Bynum brief, at p. 21. A copy of that chart is also annexed hereto at page 25-i.

The original chart is in several colors and purports to show the flow of cocaine and heroin to the Bynum organization. In this regard, it draws a conspiratorial chain from Bynum to Cordovano to Altamura to Oddo and Vanacore to Cotroni and Dasti to Europe and Mexico.

During the course of the alleged instant conspiracy, the alleged conspirators Cotroni, Dasti, Altamura, Vanacore and Oddo were under the active surveillance of the American narcotics agents (*See* our main brief at pp. 14, 17), and a number of conversations were intercepted over the Canadian taps between Oddo, Vanacore, and Dasti (*See* Table B, annexed to our main brief). All of this information was contemporaneously transmitted to the authorities in the United States. It defies belief that, at some point during the period that the instant case was pending, none of the DEA agents connected with its preparation were aware of the elaborate organizational chart which had been compiled by DEA agents during early 1971.

The government cannot escape responsibility for the trial ambush created by the late notice to the defense with respect to the alleged Bynum link. The government trial lawyer's ignorance can only be the result of gross negligence on the part of the government, itself. As noted in our main brief, the defense was unfairly made to bear the burden of that negligence.*

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* Prior to and during the trial herein, trial counsel for the defendants had no knowledge of the existence of the chart in question. It was discovered during the pendency of the instant appeal by virtue of the fortuitous fact that Bynum's appellate counsel was retained to assist in the preparation of the appellate brief herein.

B. The prejudice resulting from late notice.

The government attempts to make it appear as though the defense had ample time "to investigate the additional co-conspirators" despite the fact that their names were not provided to the defense until the first day of trial. In support of that proposition, the government refers this Court to a point in the record, in the midst of trial, when the trial judge offered to provide the defense with time to make an investigation (Gov. Br., p. 62). The government fails to advise this Court that it refused to put the defense on notice at that time as to which of the eighteen alleged conspirators on the list were going to form a part of the government's case. Indeed, as the quotation set forth at p. 41 of our main brief shows, government counsel merely stated "I can make a representation that there *won't* be testimony concerning all those people" (Tr. 121-121a) [Emphasis added]. A lure to the wild goose chase in the midst of trial. The alleged conspirators were spread throughout the Western hemisphere (A. 2237-8).

Once the government commenced presentation of the Bynum aspects of the case, during the second week of trial, the defense was caught in the trap, a trap which the Court, itself, acknowledged was brought about by virtue of delay on the part of the government (A. 2235).

When the defense requested the opportunity to interview the critical witnesses, Altamura and Cordovano, government counsel responded: "Vincent Altamura, as I pointed out before, we don't have an address, but he checks in with the United States Marshals in the Southern District. He is out on bail pending appeal. * * * Mr. Cordovano is presently incarcerated [in Atlanta, Georgia] (A. 2237). The Court directed that the government see to it that the two witnesses be "brought in as soon as possible" (A. 2239).

On January 16, 1975 (the last day of testimony), the defense was advised that Cordovano had been brought to the courthouse, and defense counsel was alloted fifteen minutes to interview him (A. 2629). With respect to Altamura, government counsel advised the Court:

> "Your Honor, the marshal informed me that the address that the Southern District had for Mr. Altamura was not a correct address. He doesn't live at that address. We haven't been able to serve him. We will try to locate him. But up to this point we haven't been able to" (A. 2628-9).

Following the luncheon recess, defense counsel advised the Court that Cordovano had not yet had an opportunity to consult with his own attorney and that, in view of Cordovano's pending petition for a writ of certiorari growing out of the same facts, "he indicated he will refuse to testify, or, at this point, until he talks to his lawyer" (A. 2623-4). A United States Marshal was dispatched to locate Cordovano's lawyer (A. 2635). In the same connection, government counsel indicated that, if Cordovano agreed to testify, he would be given immunity only with respect to prosecution in the Eastern District of New York, and not elsewhere (A. 2634).

Later in the day, the Court reported, with respect to the search for Cordovano's attorney, "We called his office, he was not there. He was someplace else" (A. 2664).

By the time of summations, no one had been able to locate Altamura, and nothing further had been accomplished with Cordovano (Tr. 1575). A motion to strike Stewart's testimony based on the late notice given to the defense and the inability to interview witnesses, was denied by the Court (*id.*).

The government's claim that the defense suffered no prejudice is absurd. The defense was rendered utterly powerless to contest the government's circumstantial claims with respect to the so-called Bynum link. The prejudice was compounded by the government's last minute claim expanding the charges of the indictment into a *heroin* conspiracy, as set forth in our main brief at pp. 43-4.

With respect to the alleged heroin enlargement of the conspiracy, it is significant to note that, even when making an offer of proof to the Court as to the testimony anticipated from Stewart, the prosecutor blatantly continued the ambush tactics by totally omitting any mention of the heroin claim (A. 2104 *et seq.*). His rationale for admitting the testimony at that point was merely "to show Oddo and Vanacore and Dasti knew Altamura" (A. 2107). As Stewart's testimony came into evidence and defense objections mounted, the prosecutor suddenly shifted his rationale as to the purpose of Stewart's testimony, never shifting his tactic to ambush the defense at the last possible moment, however, agreeing with the Court that the testimony would have been "unnecessary if the defendant would somehow concede or not contest the substance that was dealt in. I do not know whether they can do that. This is all just to get in the chemist's report that it was cocaine" (A. 2258). As pointed out by defense counsel, "No one ever suggested [this later theory] until [Stewart's testimony] is before the jury, that something might be worked out." He moved for a mistrial, which was denied (A. 2259).

In its appellate brief, the government argues:

> "This evidence, introduced through the testimony of George Stewart, was admitted to show the complete picture of the overall conspiracy to import cocaine and the motive of appellants and others to obtain a new source for heroin" (Gov. Br., at pp. 63-4).

It is clear the government intended from the outset to smear heroin into the tiral to the grave prejudice of the defendants, regardless of how unfair or improper its tactics, to deprive the defense of an opportunity to defend, and the defendants of a fair trial.

POINT V

The District Court improperly permitted the government to violate the marital privilege of the defendant Dasti by the receipt in evidence of intercepted telephone conversations between Dasti and his wife.

The government argues that the wiretapped communications herein between Dasti and his wife were not privileged because, "while incriminatory in the context of the other evidence, they are by themselves purely innocuous and fall within the category of 'daily and ordinary communications' " or, alternatively, that the marital privilege ought be retroactively eliminated, or, finally, that the use in evidence of those conversations was "harmless error". The government's contentions should be repudiated by this Court in all respects.

An examination of the telephone conversations between Mr. and Mrs. Dasti (A. 1904, 2015, 2017, 2052) leaves little doubt that Dasti would not have had such conversations with his wife but for his "confidence in * * * the marital relationship". *People* v. *Melski*, 10 N.Y. 2d 78, 80 (1961). That fact is made crystal clear if, indeed, the government's claims with regard to Dasti's alleged criminal behavior are correct.

The suggestion that the privilege ought be eliminated completely by this Court has recently been rejected by this Court. *See*: *United States* v. *Fisher*, — F.2d —, June 15, 1975, slip sheet ops. at 4526; Weinstein & Burger, *Evidence*, § 502[03] at p. 505-12; cf. 18 U.S.C. § 2517(4).

The government's claim of "harmless error" is contradicted by the finding of the trial court that "these conversations therefore are highly relevant to the crime, linking defendant Dasti to the alleged offense" (A. 210-11). Given the history of proceedings in this case, and the government's tenacious efforts to secure the admission in evidence of the wiretaps, it is incredible that the government would now claim that the four conversations of Dasti with his wife are harmless error and that the eight international conversations of Cotroni (including those with Dasti) are also harmless error. These, combined with three telephone conversations with Cotroni's maid, make a total of fifteen out of thirty-two telephone conversations.

CONCLUSION

For all of the above reasons, the judgments of conviction should be reversed.

Respectfully submitted,

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LJG
July 30, 1975

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